

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6072

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

DONNA LEARY, JAMES LEARY, BERNICE HENRIKSEN,
MARY JANE WAGNER, CHARLES SMITH, FRANCES AGNELLO,
JOSEPH PARELLA, WILLIE MATHIS,
individually and on behalf of all others
similarly situated; PHOENIX UNLIMITED, an
unincorporated association,

Plaintiffs-Appellants,

-against-

HETTY JEAN CRAPSEY, HAROLD A. SHAY, JAMES WHITE,
JOHN J. PETROSSI, DWIGHT VAN DE VATE, THOMAS E.
MCGRATH, ROBERT D. WATERMAN, WILLIAM E. HANSON,
individually and in their official capacity as
Commissioners of the Rochester-Genesee Regional
Transportation Authority; JOHN GARRITY, individ-
ually and in his official capacity as Resident
Manager of the Regional Transit Service, Inc.;
WILLIAM T. COLEMAN, JR., individually and in his
capacity as Secretary of the United States Depart-
ment of Transportation; ROBERT E. PATRICELLI,
individually and in his capacity as Administrator
of the United States Urban Mass Transportation
Administration; and their agents, employees,
successors in office, assistants and all persons
acting in concert or cooperation with them or at
their direction or under their control,

Defendants-Appellees.

On Appeal from the United States District
Court for the Western District of New York

BRIEF FOR LOCAL DEFENDANTS-APPELLEES

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WILLIAM T. COLEMAN, JR., individually and in his
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individually and in his capacity as Administrator
of the United States Urban Mass Transportation
Administration; and their agents, employees,
successors in office, assistants and all persons
acting in concert or cooperation with them or at
their direction or under their control,

Defendants-Appellees.

BRIEF FOR LOCAL DEFENDANTS-APPELLEES

STATEMENT

This is an appeal by plaintiffs from a summary judg-
ment of the District Court for the Western District of New York

dismissing their complaint in all respects. Plaintiffs, mobility-handicapped individuals and an association, challenged specific capital grant applications to the United States Urban Mass Transportation Administration for partial federal funding of particular capital programs for the mass-transportation system operated in Monroe County, New York, by the Rochester-Genesee Regional Transportation Authority and its operating subsidiary Regional Transit Service, Inc. The decision below, by Honorable Harold P. Burke, District Judge, held that plaintiffs had no rights under, and/or that defendants had not violated, any of the various federal statutory and constitutional provisions upon which plaintiffs had relied. (A. 209-13).¹

QUESTION

The issue before this Court is whether the District Court's holding and grant of summary judgement to defendants were correct.

FACTS

According to the complaint (A. 6-27), this was purportedly a class action (A. 13-14) by various mobility-

1 References to "A." are to the numbered pages of the Appendix to this Court.

handicapped individuals (i.e., confined to wheelchairs or dependent on crutches) (A. 7-11) and an unincorporated association that claims to represent mobility-handicapped persons (A. 11-12) complaining that the individual plaintiffs and other mobility-handicapped individuals in Monroe County have not been and are not being afforded full access to the mass-transportation services and facilities of the Rochester-Genesee Regional Transportation Authority and its operating subsidiary Regional Transit Service, Inc. Specifically, plaintiffs' complaint purported to state claims under the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. §§ 1601 et. seq., specifically Section 16, 49 U.S.C. § 1612 (A. 20-21); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (A. 21-22); Section 315 of the Department of Transportation and Related Agencies Appropriation Act of 1975, Pub. L. 93-391 (A. 22-23); the Civil Rights Act of 1871, 42 U.S.C. § 1983 (A. 23); the Fourteenth Amendment to the United States Constitution (id.); and the Fifth Amendment to the United States Constitution (A. 23-24).

The Rochester-Genesee Regional Transportation Authority ("R-GRTA") is a New York public benefit corporation created by Section 1299-dd(1) of the New York Public Authorities Law. (A. 34). R-GRTA's purposes, as stated in Section

1299-ee, include "the continuance, further development and improvement of transportation and other services related thereto" within the area of R-GRTA's operations, the Rochester-Genesee Regional Transportation District. Regional Transit Service, Inc. ("RTS") is a public benefit subsidiary corporation organized, as an operating subsidiary of R-GRTA, pursuant to Section 1299-hh(5) of the New York Public Authorities Law. (A. 34).

The defendants-appellees Crapsey, Shay, White, Petrossi, Van DeVate, McGrath, Waterman, and Hanson were Commissioners of the R-GRTA, and defendant-appellee Garrity is the Resident Manager of RTS. (Id.) Each is purportedly sued in an individual and official capacity, and they are hereafter referred to as the "local defendants." The other defendants-appellees (hereafter referred to as the "federal defendants") were the Secretary of the United States Department of Transportation and the Administrator of the United States Urban Mass Transportation Administration ("UMTA"), to whom have been delegated certain of the powers and functions of the Secretary of Transportation under the Urban Mass Transportation Act of 1964, as amended, and other statutes authorizing federal financial assistance to mass transportation. 49 C.F.R. § 1.51.

The extensive nature of the R-GRTA/RTS mass-

transportation system, which has been designed and is operated to serve the mass-transportation needs of all the residents of the RTS service area, is detailed in the local defendants' moving affidavit below (A. 33-49) and need not be repeated in detail here. The service area contains a total population of approximately 1,000,000 people, and the system, which contains approximately 525 fixed-route miles, was used in 1975 for over 24,000,000 trips annually. (A. 37).

The RTS Urban and Suburban Service is a fixed-route regularly scheduled bus service, consisting of 23 regularly scheduled lines, serving the City of Rochester and environs. (A. 37). The RTS Park and Ride Service is a fixed-route regularly scheduled bus service providing peak-hour express commuter bus service between 6 outlying suburban areas and the City of Rochester central business district and Eastman Kodak facilities along Lake Avenue in Rochester. (A. 38). The buses used in the RTS Urban and Suburban Service are conventional 45-53-passenger line-haul transit buses, with V-6 diesel engines, 35-40 feet in length. (Id.) The buses used in the RTS Park and Ride Service, which service longer hauls at higher speeds on available expressways, are conventional 49-passenger suburban coach buses, with V-8 diesel engines, 40 feet in length. (Id.)

In addition to the fixed-route regularly scheduled bus services mentioned above, RTS also operates, under the auspices of R-GRTA, the PERT (an acronym for Personal Transit) Dial-A-Ride Service, which was instituted in Monroe County in 1973. (A. 38-39). Dial-A-Ride Service is not a fixed-route line-haul service; instead, it is a demand-responsive bus service presently providing door-to-door service within the 2 Dial-A-Ride service areas and, as a special service for handicapped persons, between the Dial-A-Ride service areas and 12 fixed points in other parts of Monroe County. (A. 39). At present, the operations of the Dial-A-Ride Service are partially funded by UMTA as a demonstration program. (A. 39, 40).

The buses used in the Dial-A-Ride Service differ from the conventional line-haul buses used in the Urban and Suburban Service and the Park and Ride Service. The Dial-A-Ride buses are smaller, 20-25 feet in length, and are able to seat 17-25 passengers. (A. 39). Such buses are able to be equipped with wheelchair lifts, and R-GRTA's policy in Dial-A-Ride Service bus acquisitions has been that at least 1 in 10 Dial-A-Ride vehicles should be equipped with a wheelchair lift and tie-downs. (Id.) Of the 28 Dial-A-Ride buses in service at the time the motions were filed below, 4 were equipped with wheelchair lifts and tie-downs. (Id.)

In contrast, at the time the motions were filed below, no United States manufacturer made a full-size conventional line-haul bus with a wheelchair lift as an available option. (A. 36, 40).

In early 1974, RTS determined to seek UMTA capital grant assistance to purchase buses to replace old and mechanically deteriorating buses. The replacement program was designed to replace 23 buses per year for each of 5 years, for a total of 115 buses, of which 30 were intended to be suburban 49-passenger coaches and 85 were intended to be 45-53-passenger transit buses. (A. 41-42, 50-54). RTS accordingly submitted an application to UMTA for a mass-transportation capital improvement grant pursuant to Section 3 of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1602, and the application was assigned UMTA Project No. NY-03-0064. The application was reviewed and approved by the New York State Department of Transportation (A. 79) and by the Genesee/Finger Lakes Regional Planning Board (A. 70-78).

In February 1975 UMTA approved the application, although the approval was only for 46 new replacement buses, which, essentially, was for the first 2 years of RTS' scheduled replacement program. (A. 80-81).² After UMTA approval of

2 The extensive review of the application before UMTA approval is reflected in the Approval Memorandum that was presented to and approved by the Administrator. (A. 190-97).

RTS' specifications and bidding documents, bids were invited, received, and opened (A. 43-44), and an amendment was made to the Urban Mass Transportation Capital Grant Contract to reflect the low bid prices (A. 44). The low bids were accepted, and agreements were entered into between RTS and the low bidder. (Id.) Pursuant to those agreements, all of the 46 new buses had been delivered to RTS, and all payments, including payments with funds provided by UMTA, had been made prior to the filing of the motions below.

To continue its replacement program, and to add services and facilities, including an expansion of the areas served by the Dial-A-Ride Service, RTS has submitted another application to UMTA. This application, submitted in August 1975, for the purchase of 23 transit buses, 12 suburban coaches, 5 Dial-A-Ride small buses, and 24 shelters, was eventually subdivided and assigned UMTA Project No. NY-05-0003 and Project No. NY-03-0064-02. (A. 45-47, 84-90). The application was reviewed and approved by the New York State Department of Transportation (A. 103) and by the Genesee/Finger Lakes Regional Planning Board (A. 102). As of the time of the filing of the motions below, and still, UMTA had taken no action on either of these applications, however, and both are still pending. (A. 47).

As required by Section 3(d) of the Urban Mass Transportation Act, 49 U.S.C. § 1602(d), before the submission of any of these capital grant applications, RTS held a public hearing to consider the projects for which federal financial assistance would be sought. (A. 200-03). The public hearing was advertised in local newspapers of general circulation (A. 198, 199), as required by Section 3(d), 49 U.S.C. § 1602(d), and the public notices specifically mentioned the proposed projects' consideration of the needs of the elderly and handicapped. Despite this public notice, none of the plaintiffs, no member of the plaintiff association, and no other handicapped person or representative appeared at the hearing. (A. 203).

The local defendants and the federal defendants moved the District Court for Orders dismissing the complaint for failure to state any claim upon which relief could be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. (A. 30-32, 181-82). The motions were granted (A. 209-13), and the District Court entered a summary judgment dismissing the action in its entirety. (A. 214). From that decision and judgment plaintiffs appeal.

ARGUMENTS

Point I

NONE OF THE STATUTORY AND
CONSTITUTIONAL PROVISIONS
RELIED ON REQUIRES THAT
EVERY BUS BE WHEELCHAIR
ACCESSIBLE OR THAT ALL
BUS SERVICE BE DEMAND-
RESPONSIVE.

Plaintiffs-appellants' challenge to the R-GRTA/RTS mass-transportation system and to the partial federal funding thereof has to have as its underlying proposition the argument that federal law requires and has always required either (a) that every bus purchased with federal financial assistance be equipped with a wheelchair lift and tie-downs and (b) that every federally assisted mass-transportation system provide demand-responsive bus service to handicapped persons. Relevant case law, statutes, and regulations, however, provide no such requirement. Plaintiffs-appellants purport to rely upon a number of different federal statutory and constitutional provisions, each of which will be dealt with separately.³

3 Although the complaint purports to contain a claim (R. 22-23) under Section 315 of the Department of Transportation and Related Agencies Appropriation Act of 1975, Pub. L. 93-391, printed at 1974-1 U.S.C.C. & A.N. 878, it appears to be undisputed that none of the monies appropriated by that act have been used to fund the relevant R-GRTA application. (A. 188, 212). Accord-

A. The Urban Mass Transportation
Act of 1964, as amended

One of the statutes plaintiffs rely on is Section 16 of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1612. The operative provision is paragraph (a):

"It is hereby declared to be the national policy that elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities and services; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions implementing this policy." 49 U.S.C. § 1612(a).

It is submitted that Section 16 simply did not upon

ingly, appellants' brief does not discuss the act, and we assume that this claim has been withdrawn. We note that the Department of Transportation and Related Agencies Appropriation Act of 1976, Pub. L. 94-134, printed at 1975-1 U.S.C.C. & A.N. 89 Stat. 695, contains no such provision, and the only reference in the Department of Transportation and Related Agencies Appropriation Act of 1977, Pub. L. 94-387, printed at 1976-1 U.S.C.C. & A.N. 1171, to elderly and handicapped persons is the requirement in Section 315, *id.* at 1186, of certain fare reductions during non-peak hours.

- 4 Section 16 is entitled "Planning and design of mass transportation facilities to meet special needs of elderly and handicapped;" paragraph (a), quoted in the text, is entitled "Congressional declaration of policy."

enactment and does not now require that all buses be equipped with wheelchair lifts and equipment or that all bus service be demand-responsive. The Urban Mass Transportation Act of 1964, Pub. L. 88-365, now 49 U.S.C. §§ 1601 et seq., was enacted without Section 16. The Section was added by the Urban Mass Transportation Assistance Act of 1970, Pub. L. 91-453 § 8, by an amendment first introduced on the floor of the House of Representatives by Congressman Biaggi, 116 Cong. Rec. 34180-81 (Sept. 29, 1970), which amendment was not considered by any standing committee of the Congress. Neither Congressman Biaggi nor any of the Congressional committees that have considered the Act since has indicated that Section 16 was intended immediately to mandate any particular sort of bus equipment or service, or to preclude federal grant assistance for buses not equipped with wheelchair lifts and other equipment, or to require only demand-responsive bus service.

The language of the Section as a whole demonstrates that such was in fact not Congress' intent, and that the Section was intended only to encourage special projects and special planning programs designed to meet the needs of elderly and handicapped persons. Paragraph (b) provides for federal grants and loans to assist mass transportation services that are planned, designed, and carried out so as to meet "the

special needs of elderly and handicapped persons." 49 U.S.C. § 1612(b). For this purpose, 2% of the obligations authorized under Section 3 of the Act, 49 U.S.C. § 1602, may be used. 49 U.S.C. § 1612(b). Paragraph (c) provides for federal financial assistance for research and development "to increase the information and technology which is available to provide improved transportation facilities and services planned and designed to meet the special needs of elderly and handicapped persons." 49 U.S.C. § 1612(c). For this purpose, 1 1/2% of the amounts available under Section 5 of the Act, 49 U.S.C. § 1604, may be used. 49 U.S.C. § 1612(c).

In other words, the provisions of Section 16 itself, 49 U.S.C. § 1612, demonstrate that the Section does not require all federally financed buses to be equipped with wheelchair lifts and equipment, did not impose a sudden change in United States bus technology overnight. If it did, there would be no need for the special programs provided in paragraphs (b) and (c). The Section recognizes that the mass-transportation needs of the elderly and handicapped are "special," and that such special needs may need to be separately provided and funded. When the amount authorized under paragraph (b) was increased from 1 1/2% to 2% of the amounts authorized under Section 3 of the Act, 49 U.S.C. § 1602, by the Federal-Aid Highway Act of

1973, Pub. L. 93-87 § 301(g), one of the Congressional committees studying the change called the change a "protective provision . . . which would . . . provide from funds authorized for capital grants under the Act additional funding on a permissive basis for providing mass transit services to meet the special needs of the elderly and the handicapped." H.R. Rep. No. 93-118, reprinted at 1973-2 U.S.C.C. & A.N. 1859, 1921. It can hardly be said that wheelchair-accessibility lifts and equipment are mandatory if a "protective provision" authorizing special funding is only "permissive."

The absence of any congressional mandate that all buses be equipped with wheelchair lifts was merely reflective of then-existing technology. Until recently, and at the time UMTA Project No. NY-03-0064 was approved, no United States bus manufacturer made a conventional line-haul bus that had a wheelchair lift as an available option. (A. 36, 40). It is submitted that federal law could not mandate the impossible. See Yakus v. United States, 321 U.S. 414, 424 (1943).

In Snowden v. Birmingham-Jefferson County Trans. Auth., 407 F. Supp. 394 (N.D. Ala. 1975), aff'd on opinion below, 551 F.2d 362, rearg. denied, 554 F.2d 475 (5th Cir. 1977), the court considered the statutory requirements in light of current technological conditions:

"Special efforts have been made by BJCTA by the installation of special equipment and features such as stanchions, grab-rails, step-well lighting, power-assisted doors, etc., to aid handicapped persons other than those confined to wheelchairs in boarding and alighting from its buses. Modern technology has not progressed to the point of doing any more for those persons confined to a wheelchair than is already being done by BJCTA. In view of the present state of available bus technology, as above described, it would seem inherently unreasonable to bring all new bus procurement to a halt while new equipment is being designed, developed, tested and produced. Such a course of action would harm the general public without in any way aiding plaintiff and the class she represents." 407 F. Supp. at 397.

Similary, In United Handicapped Federation v. Andre, 409 F. Supp. 1297 (D. Minn. 1976), vacated on other grounds, 558 F.2d 413 (8th Cir. 1977), the court, citing Snowden, held that Section 16 does not mandate wheelchair lifts and equipment:

"The court is not persuaded that the statute requires that every standard-size transit bus be specially equipped to transport the wheelchair handicapped. . . . It would seem unreasonable to interpret the statute as requiring total accessibility since no bus manufacturer in the United States presently manufactures a standard-size transit bus specially equipped to transport, with safety, those confined to wheelchairs." 409 F. Supp. at 1300.

See also Vanko v. Finley, No. C76-1305 (N.D. Ohio 6/1/77) at 7-10 (copy attached as Attachment C to federal appellees' brief).

The history of the Department of Transportation's and the Urban Mass Transportation Administrator's regulatory and rule-making activities, which are entitled to great deference, see Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971), demonstrate that those charged with administering the applicable federal statutes have not believed that those statutes have ever required or even still require any particular type of bus or service.

Prior to April 1976, applicable regulations contained no such requirement at all. The regulations governing UMTA grants, 49 C.F.R. Part 613, had no express requirement for special planning or for any particular type of bus design or service.

On April 27, 1976, the Urban Mass Transportation Administrator issued final regulations and advisory information pursuant to Section 16, and also pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The material is printed at 41 Fed. Reg. 18234-41 (4/30/76).

New 49 C.F.R. § 613.204, added at 41 Fed. Reg. 18234 (4/30/76), requires, for future UMTA grants, special planning efforts and special programming elements to meet the special needs of elderly and handicapped persons. The special planning element became effective May 31, 1976, and the programming

element was applicable only to projects submitted after September 30, 1976. 41 Fed. Reg. 18234 (4/30/76). Further, UMTA applicants must demonstrate "reasonable progress" in implementing previously programmed projects, new 49 C.F.R. § 613.204(c), added at 41 Fed. Reg. 18234 (4/30/76), although this requirement did not become applicable until September 30, 1977. Id. To assist in implementing this programming requirement, UMTA also issued at 41 Fed. Reg. 18234 (4/30/76) advisory information as an appendix to 49 C.F.R. Part 613 Subpart B. The appendix lists examples of "special efforts" that will be satisfactory in the programming area, none of which requires wheelchair accessibility on all buses, and none of which requires that all bus service be demand-responsive.

Also on April 27, 1976, UMTA issued a new 49 C.F.R. Part 609, which lists specifications for buses purchased with UMTA funding assistance after May 31, 1976. Among other items, UMTA stated that it would require that all new transit bus bid packages must have an available wheelchair accessibility option, which will include a level change device (i.e., lift or ramp) and at least one securement device. New 49 C.F.R. § 609.15(b), added at 41 Fed. Reg. 18240 (4/30/76). The date for the effective date of this requirement, which was left open pending further public hearings, was later established as

February 15, 1977, 41 Fed. Reg. 32286 (8/2/76), 41 Fed. Reg. 45842 (10/18/76), and then postponed pending the Secretary of Transportation's decision on Transbus, discussed below, 42 Fed. Reg. 13816 (3/14/77). Because of that Transbus decision, the new 49 C.F.R. § 609.15 has recently been further amended. 42 Fed. Reg. 48339 (9/23/77). Even when the requirement becomes effective, however, the requirement is only that such wheelchair accessibility packages be available as an option, not that bus purchasers opt to purchase such packages:

"[T]he Federal Government should leave to local jurisdictions the choice whether to use such wheelchair accessible transit buses or separate specialized services, or some combination, to meet the transit needs of wheelchair users and semi-ambulatory persons." 41 Fed. Reg. 32286 (8/2/76).

New 49 C.F.R. § 609.15(b), added at 41 Fed. Reg. 18240 (4/30/76), also added specific requirements as to floor and step heights of new buses. This provision was originally made applicable February 15, 1977, 41 Fed. Reg. 32286 (8/2/76), 41 Fed. Reg. 45842 (10/18/76), was later changed to May 27, 1977, 42 Fed. Reg. 9654 (2/16/77), and was then postponed pending the Transbus decision, 42 Fed. Reg. 13816 (3/14/77).

On May 19, 1977, after considerable study and public hearings, the Secretary of Transportation issued a statement to the effect that a newly developed full-size bus, known as

Transbus, with low floor, wide door, and ramp, would be mandated.⁵ Transbus, which is intended to be a new generation of buses, was developed and tested in a \$27,000,000 UMTA program over several years (A. 187). The effective date of that mandate is September 30, 1979, by which time United States manufacturers should be able to revise their facilities to produce the new design, and all of the requirements recited above are to be interim regulations only. In light of the Secretary's Transbus decision, an amendment to the Urban Mass Transportation Act that would have required full accessibility on every bus was withdrawn, 123 Cong. Rec. S. 10560-67 (Daily Ed. 6/23/77), as "no longer necessary, id. at S. 10560 (Senator Williams), and "no longer required," id. (Senator Chiles). Senator Williams called the Transbus decision "really one of the most promising developments that the elderly and handicapped could have in terms of accessibility on mass transportation vehicles." Id. at S. 10567.

B. The "Discrimination" Statutes and Constitutional Provisions

Plaintiffs-appellants also purport to rely on a number of anti-discrimination statutes and constitutional pro-

5 A copy of the Secretary's decision is attached to the federal defendants' brief as Appendix A.

visions, none of which is specifically addressed to mass transportation facilities or services. These are Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794;⁶ the Equal Protection Clause of the Fifth and Fourteenth Amendments to the United States Constitution; and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

No case under any of these provisions has ever held that that provision has ever required or now requires each bus to be equipped with a wheelchair lift and tie-downs or that all bus service must be demand-responsive. Indeed, given the existence of a specific statute, the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. §§ 1601 et seq., specifically its Section 16, 49 U.S.C. § 1612, dealing with mass transportation facilities and services and the handicapped, it would be unwise statutory construction to construe these generalized provisions as containing such a precise requirement. See Vanko v. Finley, *supra*, at 15. Nothing in the legislative history of any of these provisions suggests that any of them was intended to go beyond and supercede Section 16 of the Urban Mass Transportation Act, 49 U.S.C. § 1612.

6 "No otherwise qualified handicapped individual in the United States, as defined in [29 U.S.C. § 706(6)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Further, unlike Section 16, there are no regulations that suggest any such requirement or that even apply to mass transportation facilities or services. Regulations that have been adopted by the Secretary of Health, Education, and Welfare pursuant to Section 504 of the Rehabilitation Act of 19 29 U.S.C. § 794, and Executive Order 11914, which are new 45 C.F.R. Part 84, added at 42 Fed. Reg. 22675 (5/4/77), amended at 42 Fed. Reg. 22888 (5/5/77), apply only to financial assistance from the Department of Health, Education, and Welfare, new 45 C.F.R. § 84.2, added at 42 Fed. Reg. 22678, and have no application to financial assistance from the Department of Transportation or the Urban Mass Transportation Administration. Regulations that apparently would apply to UMTA-funded programs have been proposed by the Secretary of Health, Education and Welfare, 42 Fed. Reg. 32264 (6/24/77), but those proposed regulations have not yet been adopted. The regulations that have been promulgated by the Urban Mass Transportation Administrator, and which are discussed above under Section 16 of the Urban Mass Transportation Act, 49 U.S.C. § 1612, were promulgated partly under the authority of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, but, as discussed above, none requires that each bus now be equipped with a wheelchair lift or that all bus service be demand-responsive.

The only federal appellate court to have considered the merits of the issues involved in this action⁷ has agreed with the above analysis. Snowden v. Birmingham-Jefferson Co. Trans. Auth., 551 F.2d 862, rearg. denied, 554 F.2d 475 (5th Cir. 1977), aff'g 407 F. Supp. 394 (N.D. Ala. 1975). The Snowden case involved claims by mobility-handicapped individuals under Section 16 of the Urban Mass Transportation Act, 49 U.S.C. § 1612; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; and the Equal Protection Clause. The District Court held that none of those provisions requires that each federally assisted bus be wheelchair-accessible or that all federally assisted bus service be demand-responsive, and that none of the provisions had been violated. The Court of Appeals affirmed on the District Court's opinion. See also Vanko v. Finley, supra.

7 Two other federal appellate courts have remanded dismissals of claims similar to those involved here for a consideration of the specific UMTA projects there involved in light of the new UMTA regulations discussed above, which had been promulgated after the District Courts' decisions there involved. United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

Point II

THE FACILITIES AND SERVICES OF
R-GRTA AND RTS HAVE FULLY CON-
FORMED WITH ALL REQUIREMENTS
OF LAW APPLICABLE TO THEM.

As demonstrated above, none of the statutory or constitutional provisions relied on by plaintiffs requires that each bus--or even only each federally assisted bus--be equipped with a wheelchair lift and tie-downs or that all bus service be demand-responsive. But that does not mean, of course, that the provisions lack any requirement at all. We submit that the requirements that are applicable have been fully complied with by R-GRTA and RTS.

A. Section 16 of the Urban Mass
Transportation Act of 1964.

Section 16 of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1612, a planning section, mandates "special efforts" in the planning and design of mass transportation facilities and services for the elderly and handicapped. It should be noted that Section 16 appears to apply only to UMTA, rather than to local recipients of UMTA capital assistance, and UMTA's development and then adoption of the Transbus program and other regulatory and rule-making activities discussed above comply with the statute's requirements.

To the extent that Section 16(a) has application to local recipients, it is submitted that R-GRTA's and RTS'

efforts have already been extensive and have fully complied with all requirements of the Act. A listing of the major steps taken by R-GRTA and RTS was presented to the District Court and is repeated in the Appendix at A. 120-22. The key effort, of course, has come from and through R-GRTA's Transportation Committee for the Elderly and Handicapped, whose minutes are contained in the Appendix at A. 123-70. That committee, which is now an R-GRTA standing committee and whose membership includes elderly and handicapped persons and representatives of public and private agencies and groups serving the needs of elderly and handicapped persons, has extensively studied and planned for the transportation needs of elderly and handicapped individuals. Through the work of that committee, R-GRTA and RTS have taken various steps as "special efforts," including the following (A. 48):

(a) R-GRTA and RTS have adopted a policy that at least 1 in 10 Dial-A-Ride vehicles will be equipped with wheelchair lifts and other necessary wheelchair equipment.

(b) R-GRTA and RTS have adopted a policy that all future conventional line-haul buses will be equipped with a "kneeling feature," by which the front step can be lowered 6-9 inches to ease access.

(c) R-GRTA and RTS have adopted a policy that all future buses will be equipped with special grab rails, step risers, and lights to ease access.

(d) R-GRTA and RTS have adopted a policy of reserving the 3 seats directly behind the driver on line-haul buses for handicapped persons.

(e) R-GRTA and RTS have adopted a policy of 50% fare reduction for elderly and handicapped persons in off-peak hours and on weekends and holidays.

(f) All buses purchased with UMTA funding assistance fully conform to applicable UMTA requirements.

The recent UMTA regulations under Section 16 of the Urban Mass Transportation Act, 49 U.S.C. § 1612, and under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, do not make R-GRTA's and RTS' efforts unlawful. Before proceeding with an analysis of those regulations, we note that none is applicable to the first challenged application, UMTA Project No. NY-03-0064, and few will be applicable to the second challenged applications, UMTA Project No. NY-05-0003 and UMTA Project No. NY-03-0064-02, if either of those applications is eventually granted. UMTA Project No. NY-03-0064 was approved in February 1975 (A. 43, 80-81), and contracts with bus manufacturers were entered into in July and August 1975 (A. 44). All of those buses have already been delivered and paid for. UMTA Project No. NY-05-0003 was submitted in August 1975 (A. 84) and was divided into two applications in February 1976 (A. 46). Those two applications are still pending.

The first of the relevant UMTA regulations was

promulgated on April 27, 1976, and was published at 41 Fed. Reg. 18234-41 (4/30/76). New 49 C.F.R. Part 613 requires special planning efforts and special programming elements to meet the special needs of elderly and handicapped persons. First, the new regulation required that the urban transportation planning process exhibit "satisfactory special efforts in planning public mass transportation facilities and services that can be utilized by elderly and handicapped persons." 49 C.F.R. § 613.204(a). This requirement became effective May 31, 1976. 41 Fed. Reg. 18234 (4/30/76). Second, the annual element of the transportation improvement program must contain "projects or project elements designed to benefit elderly and handicapped persons, specifically including wheelchair users and those with semiambulatory capabilities." 49 C.F.R. § 613.204(b). This requirement, however, is applicable only to transportation improvement programs submitted after September 30, 1976. Id. Third, "[a]fter September 30, 1977, reasonable progress" must be "demonstrated in implementing previously programmed projects. 49 C.F.R. § 613.204(c).

In other words, none of those requirements had even been promulgated when UMTA Project No. NY-03-0064 was consummated, and none applies to UMTA Project No. NY-05-0003 or to UMTA Project No. NY-03-0064-02. Indeed, the "reasonable progress . . . in implementing" requirement, 49 C.F.R. § 613.204(c), has only been in effect a few days.

Despite the inapplicability of the new planning regulation, local planning efforts with respect to the capital grant applications at issue has been substantial. Some of such efforts are outlined in the applications to UMTA (A. 67, 69, 95-96, 97, 98-100, 101), in R-GRTA's chronology of planning efforts with respect to the elderly and handicapped (A. 120-22), in the minutes of R-GRTA's Committee on Elderly and Handicapped (A. 123-70), and in the UMTA approval memorandum that was presented to and approved by the Administrator (A. 190-92). Additionally, R-GRTA's 1976 Transportation Improvement Program (A. 106-17) projected expansions in the Dial-A-Ride fleet for each of the next 5 years. (A. 109). As discussed in the federal appellees' brief (page 23 & n.68), such planning efforts complied with applicable regulations.

The new April 1976 regulations also added a new 49 C.F.R. Part 609, which lists specifications for buses purchased with UMTA funding assistance after May 31, 1976. This includes the requirement that bus bid packages must contain an option on a wheelchair accessibility package and at least one securement device, 49 C.F.R. § 609.15(b), although this requirement was not originally effective until February 15, 1977, 41 Fed. Reg. 32286 (8/2/76), 41 Fed. Reg. 45842 (10/18/76). It also includes the requirement of specific floor and step heights of new buses to make them more accessible to elderly and handicapped persons, 49 C.F.R. § 609.15(b), although this

requirement was not originally effective until May 27, 1977, 42 Fed. Reg. 9654 (2/16/77). Both of these requirements were delayed even further, 42 Fed. Reg. 13816 (3/14/77), pending the Secretary of Transportation's decision on Transbus.

In other words, none of these requirements was applicable to UMTA Project No. NY-03-0064. During the pendency of R-GRTA's applications with respect to UMTA Project No. NY-005-0003 and UMTA Project No. NY-03-0064-02, some of the requirements with respect to bus design have become effective, and R-GRTA is fully prepared and willing to comply with them.

A third area of rule-making activity is the Secretary of Transportation's mandate on May 19, 1977, that all UMTA-assisted buses must be the newly developed Transbus, which will be equipped with low floor, wide door, and wheelchair ramp. The effective date of this requirement is September 30, 1979, and R-GRTA will comply with it in future applications where applicable.

B. The Discrimination Provisions

Analysis under the anti-discrimination statutory and constitutional provisions plaintiffs-appellants rely on must be different, because those provisions prohibit described discrimination rather than require a described planning or programming effort.

Section 504 of the Rehabilitation Act of 1973, 29

U.S.C. § 794, provides:

"No otherwise qualified handicapped individual in the United States, as defined in [29 U.S.C. § 706(6)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

It is submitted that this Section provides no assistance to plaintiffs. Very simply stated, no handicapped person, including any of plaintiffs-appellants here, is discriminated against by R-GRTA and RTS or is "excluded from" the mass-transportation services and facilities operated by R-GRTA and RTS. That some wheelchair users are unable to board a conventional line-haul bus when it stops for them is not "discrimination" or "exclusion," any more than it is discrimination or exclusion that some people, including handicapped as well as non-handicapped persons, live too far from a fixed route to find RTS service convenient for their personal needs. As was said by the court in Snowden v. Birmingham-Jefferson County Trans. Auth., supra:

"[P]ersons confined to wheelchairs are permitted to ride as passengers on BJCTA vehicles. Although it is necessary for persons handicapped in this manner to arrange for someone to help them board and alight from the bus, these persons are allowed to use the transportation vehicles in question. Thus, it cannot be said that persons who ambulate by wheelchair are excluded from using the defendant's

transportation system. For this reason, the court finds no violation of the Rehabilitation Act of 1973 on the part of BJCTA or on the part of UMTA, and hence that act provides plaintiff and the class she represents with no cause of action." 407 F. Supp. at 397.

This is exactly the situation in Monroe County, New York, and the District Court so held. Plaintiffs-appellants complain about a situation that does not exist.

For essentially the same reasons, the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act, 42 U.S.C. § 1983, have not been violated. There is no discrimination against mobility-handicapped persons, or at least not "invidious" discrimination. R-GRTA and RTS have created no "suspect classification." See Frontiero v. Richardson, 411 U.S. 677, 686 (1972). The mass-transportation services and facilities offered by R-GRTA and RTS operate only intra-state, and there can be no fundamental right to full access to those services and facilities, compare Shapiro v. Thompson, 394 U.S. 618, 635 (1969), or at least no fundamental right to require only lift-equipped buses or demand-responsive service. The operations of R-GRTA and RTS, which are designed to provide as complete as possible mass transportation services throughout its service area, clearly have a rational basis, see Dandridge v. Williams, 397 U.S. 471, 485 (1970); indeed, the New York Legislature has found that R-GRTA is "performing an essential governmental function." N.Y. Pub. Auth. Law § 1299-ee(2).

As the court noted in Snowden v. Birmingham-Jefferson County Trans. Auth., supra:

"The facts of this case do not appear to involve any invidious discrimination against similarly situated persons. Such discrimination as may in fact exist results from technological and operational difficulties in designing, producing and operating the kind of special vehicles needed to allow plaintiff and the class she represents to utilize BJCTA's bus system with safety and convenience for themselves and other passengers. The affidavits . . . show that there is no device presently developed and proven reliable for use in a standard full-size urban transit bus which would make that bus fully accessible to plaintiff and her class. As the Supreme Court noted in Yakus v. United States, 'The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable.; 321 U.S. 414, 424 (1943).' 407 F. Supp. at 398.

Plaintiffs have cited nothing to show or even suggest violations of federal law. Worse, they are apparently unwilling to state precisely in what respects they even claim federal law was violated. All they have shown is that some mobility-handicapped persons cannot without assistance board some RTS buses, and their complaint has the broadside prayer for a restraint against the local defendants' purchasing any buses without wheelchair lifts. (A. 25). They would apparently have the District Court take over and operate the entire R-GRTA mass-transportation system and impose its own views on whether federal law requires a wheelchair lift for every bus, or every 2 buses, or 10 buses, or 35 buses; on whether federal

law requires manufacturers to make Transbus available before September 30, 1979; on where and on what time-tables federal law requires routes to operate to serve the needs of mobility-handicapped persons; on what proportion of the RTS fleet federal law requires to be used for demand-responsive bus service, and in what areas. Such action would in effect require the Court to re-write all the applicable federal statutes and regulations with respect to the mass transportation needs of the community. We know of no case or statute that authorizes a federal court to take such steps, and plaintiffs-appellants have cited none.

Rather, federal and state law authorize a local transportation authority or company -- here, R-GRTA -- to develop and plan, within federal regulatory guidelines, mass transportation services that fit the particular mass transportation needs of all the people in its service area. Those mass transportation needs will differ as geographic, climatic, demographic, and social conditions differ. Because of this, the mass transportation needs of the Rochester area are different from those of Syracuse, Buffalo, Los Angeles, or Phoenix. R-GRTA clearly has the planning and implementation discretion to tailor mass transportation facilities and services to the unique situations of its service area. As UMTA's proposed statement of policy on paratransit, published at 41 Fed. Reg. 46411 (10/20/76), notes:

"[T]he intent and spirit underlying the Federal program of mass transportation assistance is to leave to localities the widest possible discretion and flexibility in deciding upon the nature and mix of their transportation system." Id. at 46412.

This is exactly what R-GRTA and RTS have done and are doing, and the area-wide mix of fixed-route line-haul urban service, fixed-route express commuter service, and demand-responsive Dial-A-Ride Service serve the mass transportation needs of the entire community, including the mobility-handicapped. The proposed expansion of demand-responsive service, the establishment of a standing Committee to study and plan for the transportation needs of the elderly and handicapped, the adoption of policies as to required features on buses purchased in the future, and the other steps outlined in the record are all furthering the availability of transportation services to the mobility-handicapped. R-GRTA and RTS have the discretion to tailor transportation services to the community's needs, and there is no showing of a single way in which R-GRTA and RTS have improvidently or arbitrarily exercised that discretion. As the Supreme Court has noted, the "problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific." Dandridge v. Williams, supra, 397 U.S. at 485, quoting Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 (1913).

Point III

PART OF PLAINTIFFS-APPELLANTS'
COMPLAINT IS NOT EVEN RIPE FOR
REVIEW.

As noted above, UMTA has still not acted on UMTA Project No. NY-05-0003 or on UMTA Project No. NY-03-0064-02. The District Court held that, absent UMTA's action, there was no final agency action and that judicial review would be premature. (A. 211). In this holding the District Court was correct.

The Administrative Procedure Act, upon which plaintiffs-appellants rely (A. 7), requires a final agency action before any judicial review is appropriate. 5 U.S.C. § 704; see also 5 U.S.C. § 702. Here, there is no final UMTA action--or even intermediate UMTA action--with respect to UMTA Project No. NY-05-0003 and UMTA Project No. NY-03-0064-02. The applications have merely been submitted and remain pending.

This usual rule of judicial restraint has special force in the present instance. All of the regulations relevant to the present controversy have been promulgated since those applications were submitted. While R-GPTA and RTS are confident that the applications are meritorious, UMTA should have an opportunity to take action on them before plaintiffs' complaint should be heard. This is especially true in this situation, where not a single plaintiff or a single representative of any

plaintiff appeared at the duly advertised public hearing to discuss the proposed applications. (A 203). Appellants offer no reason why their laches should now be excused.

Point IV

SUMMARY JUDGMENT FOR ALL
DEFENDANTS WAS FULLY APPROPRIATE.

All defendants below moved to dismiss the complaint or, in the alternative, for summary judgment. (A. 30-32, 181-82). The District Court granted the motions and entered summary judgment dismissing the complaint in all respects. (A. 214). We submit that that judgment should be affirmed.

Plaintiffs-appellants attempt to claim that there were disputed issues of facts that compel a trial. But, considering the full record before the District Court, only a portion of which is reproduced in the Appendix to this Court, that argument fails, and appellants' listing of what they claim to be disputed issues of fact (App. Br. 35) is nothing more than disputed conclusions. The District Court had before it a full description of the R-GRTA/RTS mass transportation system, complete copies of the applications and correspondence concerning the applications, complete copies of the minutes of the R-GRTA Committee on Elderly and Handicapped, and full descriptions of the planning processes involved. In other words, the record contained everything necessary to determine what efforts R-GRTA has taken to develop and deliver mass-transportation services to the community, and plaintiffs disputed none of those facts below. The only remaining issue, then, was one of law: whether these activities and efforts comply with the

applicable requirements. The District Court held that they did.

Plaintiffs-appellants also attempt to complain that they were deprived of discovery, although their suggested areas of necessary discovery (App. Br. 37 n.19) are similarly conclusory. Further, plaintiffs made no attempt at all to apply for a stay of the motions so they could have what they now claim was necessary discovery, or otherwise to invoke the provisions of Rule 56(f) of the Federal Rules of Civil Procedure.⁸

We are aware that recently two Courts of Appeals, United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977), and Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977), have remanded decisions dismissing complaints by mobility handicapped persons against local transportation authorities. The remands, which appear to have been made reluctantly,⁹ were for the purpose of considering the

8 In fact, plaintiffs-appellants have not even had reproduced in the Appendix the papers upon which the stay of discovery was obtained. Those papers constitute Record Item 2, and include an affidavit showing that every case similar to this one had been dismissed around the country, that the local defendants would submit a motion to dismiss or for summary judgment, and that it seemed advisable to delay discovery until the Court had determined the substantive motion. Plaintiffs-appellants do not argue that the District Court abused its discretion in staying discovery under those circumstances.

9 "In concluding, we cannot fault the district court for its dismissal order. Without the benefit of any regulations, it is difficult to perceive what relief could have been afforded at that stage." Lloyd v. Regional

application of the new regulations, which are discussed above. In at least one of those cases, plaintiffs had limited their challenge to projects whose funding was approved after the regulations became effective. Lloyd v. Regional Transp. Auth., supra, 548 F.2d at 1287 n.30. Each of the district court decisions there involved had been written before the new regulations had been promulgated.

We submit that a remand for this purpose would be inappropriate here. The UMTA regulations were promulgated before the District Court's decision,¹⁰ and the parties briefed and argued the effects and meaning of those regulations. Another Court of Appeals has recently affirmed a summary judgment dismissing an action similar to this, even though the District Court's decision was written before the promulgation of the new regulations. Snowden v. Birmingham-Jefferson Co. Trans. Auth., 551 F.2d 862, rearg. denied, 554 F.2d 475 (5th Cir. 1977), aff'g 407 F. Supp. 394 (N.D. Ala. 1975).

Transp. Auth., supra, 548 F.2d at 1287.

"On the basis of the record before the district court, if it were not for the subsequent promulgation of the administrative guidelines and regulations, we would agree with the district court's result." United Handicapped Federation v. Andre, supra, 558 F.2d at 416.

- 10 The only administrative act which has occurred since the District Court's March 31, 1977, decision has been the Secretary of Transportation's May 21, 1977, statement on Transbus, which does not become effective until September 30, 1979.

CONCLUSION

Based on the foregoing, we respectfully submit that the District Court's summary judgment should be affirmed in all respects.

Dated: Rochester, New York
October 7, 1977

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

DONNA LEARY, et al.,

Plaintiffs-Appellants,

-against-

HETTY JEAN CRAPSEY, et al.,

Defendants-Appellees.

AFFIDAVIT OF
SERVICE BY
MAIL

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:

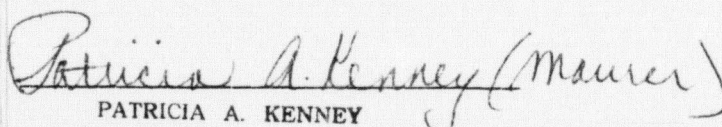
PRISCILLA C. CHESLEY, being duly sworn, deposes and says that she is a resident of the Town of Pittsford, New York; that she is over the age of eighteen years, and is a legal secretary for Harris, Beach, Wilcox, Rubin and Levey, attorneys for defendants-appellees herein. That on the 10th day of October, 1977, before five-thirty o'clock p.m., at the City of Rochester, County of Monroe and State of New York, deponent served copies of the annexed Brief for Local Defendants-Appellees upon the attorney listed below by giving copies thereof, properly and securely enclosed in a sealed wrapper, to an employee of Federal Express to be mailed from their place of business at 291 Buell Road, Rochester, New York, aforesaid directed to:

GLENN F. WASSERMAN, ESQ.
Attorney-Advisor
Office of Chief Counsel
United States Urban Mass Transportation
Administration
9320 Nassif Building
400 Seventh Street, S.W.
Washington, D.C. 20590


PRISCILLA C. CHESLEY

Sworn to before me this

10th day of October, 1977.


PATRICIA A. KENNEY

Notary Public in the State of New York
MONROE COUNTY, N. Y. 1979
Commission Expires March 30, 1981

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

DONNA LEARY, et al.,

Plaintiffs-Appellants,

-against-

AFFIDAVIT OF
SERVICE BY MAIL

HETTY JEAN CRAPSEY, et al.,

Defendants-Appellees.

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:

PRISCILLA C. CHESLEY, being duly sworn, deposes and says that she is a resident of the Town of Pittsford, New York; that she is over the age of eighteen years, and is a legal secretary for Harris, Beach, Wilcox, Rubin and Levey, attorneys for Appellees herein. That on the 10th day of October, 1977, before five-thirty o'clock p.m., at the City of Rochester, County of Monroe and State of New York, deponent served copies of the annexed Brief for Local Defendants-Appellees upon the attorneys listed below by depositing copies thereof, properly and securely enclosed in a sealed wrapper, with full postage prepaid thereon, in a post office box regularly maintained by the Government of the United States and under the care of the Post Office at Two State Street, Rochester, New York, aforesaid directed to:

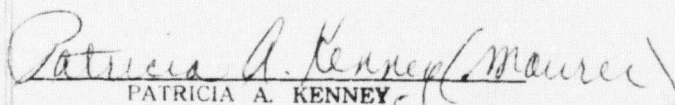
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Assistant U.S. Attorney
233 U.S. Court House
Rochester, New York 14614


PRISCILLA C. CHESLEY

Sworn to before me this

10th day of October, 1977.


PATRICIA A. KENNEY
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1979